

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

ROBIN PROCTOR,

Case No. 2:22-cv-00684-MMD-EJY

Petitioner,

ORDER

v.

WARDEN NAJERA, *et al.*,

Respondents.

I. SUMMARY

In her *pro se* 28 U.S.C. § 2254 habeas corpus petition, Robin Proctor challenges her Clark County, Nevada conviction under a guilty plea of murder with use of a deadly weapon. (ECF No. 5.) Respondents have moved to dismiss the petition as untimely and containing claims that are unexhausted, procedurally defaulted, and noncognizable. (ECF No. 16 (“Motion”).) Because the petition is untimely and Proctor presents no basis to toll the statute of limitations, the Court grants the Motion.

II. BACKGROUND

A. State-Court Proceedings

Proctor’s guilty plea arose from an incident in which she and another woman brutally beat and robbed an 85-year-old man with whom Proctor was in a relationship. The man died at the hospital from blunt force trauma. (Exh. 11, ECF No. 19-1, Exh. 35, ECF No. 17-35.) The state district court sentenced Proctor to a term of 20 years to life in prison for the murder count, with a consecutive 24 to 240 months for the deadly weapon

enhancement, for an aggregate total sentence of 22 years to life. (Exh. 12, ECF No. 17-12.) Judgment of conviction was entered on July 10, 2017. (Exh. 13, ECF No. 17-13.)¹

Proctor did not file a direct appeal. She filed a state postconviction habeas corpus petition on February 8, 2019. (Exh. 24, ECF No. 17-24.) Through counsel, she filed a supplemental petition on October 6, 2019. (Exh. 31, ECF No. 17-31.) The state district court denied the petition, concluding that it was procedurally defaulted as untimely, and Proctor failed to demonstrate good cause and prejudice to excuse the default. (Exh. 35, ECF No. 17-35.) The Nevada Court of Appeals affirmed the denial of the petition. (Exh. 57, ECF No. 17-57.)

B. Federal Habeas Proceedings

About February 2022, Proctor dispatched her *pro se* federal habeas petition for mailing. (ECF No. 1-1.) She alleges two grounds for relief:

Ground 1: Ineffective assistance of counsel for failure to investigate her claims or present a defense.

Ground 2: The Nevada state laws regarding procedural bars violate Fourteenth Amendment due process.

(ECF No. 5 at 3-8.)

Proctor moved for appointment of counsel, which the Court denied. (ECF Nos. 13, 25.) Respondents now move to dismiss the petition as untimely and procedurally defaulted. (ECF No. 16.) Proctor filed several responses to the petition. (ECF Nos. 26, 27, 29, 33.) Respondents replied. (ECF No. 31.) Because the petition is time-barred, the Court grants the Motion.

III. DISCUSSION

A. Proctor's Federal Petition is Untimely

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations on the filing of federal habeas corpus petitions. 28 U.S.C. § 2244(d). The one-year time limitation can run from the date on which a petitioner's judgment

¹An amended judgment of conviction was entered on July 28, 2017, to correct a clerical error and to properly reflect a Category A felony. (Exh. 15, ECF No. 17-15.)

1 became final by conclusion of direct review, or the expiration of the time for seeking direct
2 review. 28 U.S.C. § 2244(d)(1)(A). Where a defendant fails to seek direct review of their
3 judgment of conviction before the state appellate court, the one-year period of limitations
4 begins to run 30 days after the entry of the judgment of conviction. NRAP 4(b)(1)(A);
5 *Gonzalez v. Thaler*, 565 U.S. 134, 149-150 (2012).

6 Here, the state district court entered the judgment of conviction on July 10, 2017.
7 Proctor did not file a direct appeal; therefore, her judgment of conviction became final 30
8 days later on August 9, 2017. Her one-year AEDPA statute of limitations began to run on
9 August 10, 2017, the day after her time to seek a direct appeal expired, and absent tolling,
10 expired on August 10, 2018. 28 U.S.C. § 2244(d)(1)(A). Proctor did not file her federal
11 habeas petition until February 2022. (ECF No. 5.)

12 A properly filed petition for state postconviction relief can toll the period of
13 limitations. 28 U.S.C. § 2244(d)(2). A state petition is not deemed “properly filed” if it is
14 untimely under state procedural rules. *Pace v. DiGuglielmo*, 544 U.S. 408, 412-16 (2005).
15 “When a postconviction petition is untimely under state law, ‘that [is] the end of the matter’
16 for the purposes of § 2244(d)(2).” *Id.* at 414. Under Nevada state law, a habeas petition
17 must be filed within one year after entry of the judgment of conviction if no appeal is taken.
18 NRS § 34.726(1).

19 Here, Proctor filed her state petition on February 8, 2019, more than a year after
20 entry of the judgment of conviction on July 10, 2017. (Exh. 24, ECF No. 17-24, Exh. 13,
21 ECF No. 17-13.) The Nevada Court of Appeals affirmed the denial of the petition as
22 untimely under NRS § 34.726(1). (Exh. 57, ECF No. 17-57.) An untimely state
23 postconviction petition will not toll the AEDPA limitations period. Moreover, the AEDPA
24 limitations period had already expired before Proctor filed her (untimely) state
25 postconviction petition. Proctor’s federal petition is untimely.

26 First, Proctor appears to argue in response that medical issues including “nervous
27 breakdowns,” ulcers, and anemia prevented her from timely filing her state petition and
28

1 should excuse the procedural default of that petition. (ECF Nos. 26, 29, 33.) But an
2 untimely state postconviction petition cannot toll the AEDPA limitations period. See 28
3 U.S.C. § 2244(d)(2); *Pace*, 544 U.S. at 417; *Orpiada v. McDaniel*, 750 F.3d 1086, 1087
4 (9th Cir. 2014).

5 Second, a petitioner may be entitled to equitable tolling of the AEDPA limitations
6 period if she can show: “‘(1) that she has been pursuing her right diligently, and that (2)
7 some extraordinary circumstance stood in her way’ and prevented timely filing.” *Holland*
8 *v. Florida*, 560 U.S. 631, 649 (2009) (quoting prior authority). Equitable tolling is
9 “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and
10 “the threshold necessary to trigger equitable tolling is very high, lest the exceptions
11 swallow the rule,” *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). Equitable tolling
12 may be available when a petitioner suffered from a mental impairment so severe that the
13 petitioner was unable personally to either understand the need to timely file or prepare a
14 habeas petition and that impairment made it impossible under the totality of the
15 circumstances to meet the filing deadline despite petitioner’s diligence. *Bills v. Clark*, 628
16 F.3d 1092, 1093 (9th Cir. 2010.) Recently, the Ninth Circuit held that a petitioner “must
17 show that he has been reasonably diligent in pursuing his rights not only while an
18 impediment to filing caused by an extraordinary circumstance existed, but before and
19 after as well, up to the time for filing his claim in federal court.” *Smith v. Davis* 953 F.3d
20 598-599 (9th Cir. 2020).

21 To the extent that Proctor’s vague arguments could be construed as claiming
22 equitable tolling of her federal petition, she has not demonstrated that she is entitled to
23 such tolling. She has made bare assertions, with no elaboration whatsoever, that her
24 medical records would show medical and mental health issues. (ECF Nos. 30, 34.) She
25 vaguely refers to nervous breakdowns in July 2018, a death in the family, ulcers, and
26 anemia. (ECF No. 26.) These brief, opaque averments do not show any impairment that
27 would rise to an extraordinary circumstance that stood in the way of her timely filing.
28

1 Neither has she shown reasonable diligence. Proctor is not entitled to statutory or
2 equitable tolling. The Court, accordingly, dismisses her petition as untimely.

3 **B. Grounds 1 and 2 are also Unexhausted/Procedurally Barred from**
4 **Federal Review**

5 Proctor claims in ground 2 that Nevada's statutory procedural bars violate due
6 process. (ECF No. 5 at 6-7.) She did not present this claim in her state postconviction
7 petition, so it is unexhausted. (See Exh. 24, ECF No. 17-24, Exh. 31, ECF No. 17-31,
8 Exh. 48, ECF No. 17-48, Exh. 57, ECF No. 17-57.) Proctor claims in ground 1 that her
9 plea counsel rendered ineffective assistance for failure to investigate and present a
10 defense. (ECF No. 5 at 3-4.) She raised this claim in her state postconviction petition,
11 which the state courts denied as untimely and procedurally barred under state law.

12 Regarding exhaustion, a federal court will not grant a state prisoner's petition for
13 habeas relief until the prisoner has exhausted his available state remedies for all claims
14 raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give
15 the state courts a fair opportunity to act on each of their claims before the petitioner
16 presents those claims in a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838,
17 844 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains
18 unexhausted until the petitioner has given the highest available state court the opportunity
19 to consider the claim through direct appeal or state collateral review proceedings. See
20 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374,
21 376 (9th Cir. 1981).

22 With respect to procedural default, the Court cannot review a claim "if the Nevada
23 [appellate court] denied relief on the basis of 'independent and adequate state procedural
24 grounds.'" *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). In *Coleman v.*
25 *Thompson*, the Supreme Court held that a state prisoner who fails to comply with the
26 state's procedural requirements in presenting their claims is barred from obtaining a writ
27 of habeas corpus in federal court by the adequate and independent state ground doctrine.
28

1 See 501 U.S. 722, 731-32 (1991). A state procedural bar is “adequate” if it is “clear,
 2 consistently applied, and well-established at the time of the petitioner’s purported default.”
 3 *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996). A
 4 state procedural bar is “independent” if the state court “explicitly invokes the procedural
 5 rule as a separate basis for its decision.” *Yang v. Nevada*, 329 F.3d 1069, 1074 (9th Cir.
 6 2003).

7 Turning to ground 1, the Nevada Court of Appeals affirmed the trial court’s denial
 8 of Proctor’s state habeas petition because it was procedurally barred as untimely. (Exh.
 9 57, ECF No. 17-57.) See also NRS 34.726(1). Nevada’s statutory rule regarding
 10 timeliness is an independent and adequate state law ground for procedural default. See,
 11 e.g., *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9th Cir. 1996). The state appellate court
 12 also specifically held that Proctor failed to demonstrate good cause to excuse the
 13 procedural bars. (Exh. 57 at 2, ECF No. 17-57.)

14 Ground 2 is unexhausted and would be procedurally defaulted as untimely and
 15 successive if Proctor returned to state court to present this claim. See *Dickens v. Ryan*,
 16 740 F.3d 1302, 1317 (9th Cir. 2014) (citing *Coleman*, 501 U.S. at 731 (“An unexhausted
 17 claim will be procedurally defaulted, if state procedural rules would now bar the petitioner
 18 from bringing the claim in state court.”)). Thus, even if this petition was timely, the grounds
 19 are procedurally barred from federal habeas review.

20 **C. Ground 2 is Noncognizable**

21 A state prisoner is entitled to federal habeas relief only if she is being held in
 22 custody in violation of the constitution, laws, or treaties of the United States. 28 U.S.C. §
 23 2254(a). Alleged errors in the interpretation or application of state law do not warrant
 24 habeas relief. *Hubbart v. Knapp*, 379 F.3d 773, 779-80 (9th Cir. 2004); see also *Murdoch*
 25 *v. Castro*, 365 F.3d 699, 703 n.1 (9th Cir. 2004) (citing *Jammal v. Van de Kamp*, 926 F.2d
 26 918, 919 (9th Cir. 1991)) (“We are not a state supreme court of errors On federal
 27 habeas we may only consider whether the petitioner’s conviction violated constitutional
 28

1 norms.”); *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990) (“noting that [the federal court]
2 ha[s] no authority to review a state’s application of its own laws”).

3 Ground 2 is a challenge to the validity of Nevada state law regarding procedural
4 bars. A petitioner may not merely label an issue as one of “due process” without
5 identifying an issue cognizable on federal habeas review. Ground 2, therefore, would also
6 be subject to dismissal as noncognizable in federal habeas corpus.

7 **IV. MOTION TO SEAL**

8 Finally, Respondents have filed a motion for leave to file an exhibit *in camera* and
9 under seal. (ECF No. 18.) While there is a presumption favoring public access to judicial
10 filings and documents, a party seeking to seal a judicial record may overcome the
11 presumption by demonstrating “compelling reasons” that outweigh the public policies
12 favoring disclosure. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597
13 (1978); *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)
14 (citations omitted). In general, “compelling reasons” exist where the records may be used
15 for improper purposes. *Kamakana*, 447 F.3d at 1179 (citing *Nixon*, 435 U.S. at 598).

16 Here, Respondents ask to file Proctor’s presentence investigation report (“PSI”) *in*
17 *camera* and under seal because it is confidential under state law. They also state that it
18 contains sensitive, private information that could compromise Proctor’s safety. The Court
19 has reviewed the PSI and concludes that Respondents have demonstrated compelling
20 reasons to file the PSI under seal. However, the PSI does not appear to include
21 information that is so sensitive to warrant *in camera* filing.² Accordingly, the Court grants
22 the motion in part, and the PSI will remain under seal.

23 **V. CERTIFICATE OF APPEALABILITY**

24 This is a final order adverse to Proctor. Rule 11 of the Rules Governing Section
25 2254 Cases thus requires this Court to issue or deny a certificate of appealability (“COA”).

26
27 ²While Respondents point out that they have extensive experience filing
28 documents of this type under seal with this Court, and they are correct that PSIs are
frequently filed under seal, they do not explain why *in camera* treatment would be
necessary. (See Exh. 18.)

1 Accordingly, the court has *sua sponte* evaluated the claims within the petition for
 2 suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281
 3 F.3d 851, 864-65 (9th Cir. 2002).

4 Under 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner “has
 5 made a substantial showing of the denial of a constitutional right.” With respect to claims
 6 rejected on the merits, a petitioner “must demonstrate that reasonable jurists would find
 7 the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v.*
 8 *McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4
 9 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate:
 10 (1) whether the petition states a valid claim of the denial of a constitutional right; and (2)
 11 whether the court’s procedural ruling was correct. *Id.*

12 Having reviewed its determination that Proctor’s petition is time-barred and
 13 procedurally barred from federal habeas review, the Court finds that these rulings do not
 14 meet the *Slack* standard. Applying these standards, the Court finds that a certificate of
 15 appealability is unwarranted and therefore declines to issue a certificate of appealability
 16 for the dismissal of Proctor’s petition.

17 **VI. CONCLUSION**

18 It is therefore ordered that Respondents’ motion to dismiss (ECF No. 16) is
 19 granted.

20 It is further ordered that the petition (ECF No. 5) is dismissed as untimely.

21 It is further ordered that Respondents’ motion for leave to file exhibit *in camera* and
 22 under seal (ECF No. 18) is granted in part and denied in part. The exhibit will remain
 23 under seal.

24 It is further ordered that a certificate of appealability will not issue.

25 The Clerk of Court is directed to enter judgment accordingly and close this case.

26 DATED THIS 5th Day of September 2023.

27 
 28 MIRANDA M. DU
 CHIEF UNITED STATES DISTRICT JUDGE